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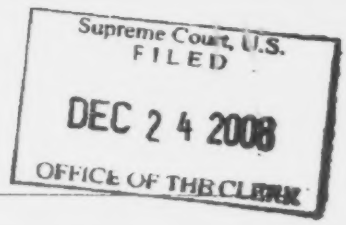

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL BOSCHETTO, PETITIONER

v.

JEFFREY D. HANSING, FRANK BOUCHER CHRYSLER DODGE JEEP, GORDIE BOUCHER FORD AND BOUCHER AUTOMOTIVE GROUP, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT GORDIE BOUCHER FORD LINCOLN-MERCURY OF JANESVILLE, INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the sale of an item through eBay provides the requisite "minimum contacts" to support personal jurisdiction over a non-resident defendant in the buyer's forum state?

2. Whether "purposeful availment" can be found utilizing the "effects test" enunciated in *Calder v. Jones*, 465 U.S. 783 (1984) to confer jurisdiction over the seller of merchandise through the Internet auction site, such as eBay, where it is alleged that the seller committed tortious act in the forum state arising from the transaction?

CORPORATE DISCLOSURE STATEMENT

Respondent GORDIE BOUCHER FORD LINCOLN-MERCURY OF JANESVILLE, INC., sued herein as FRANK BOUCHER CHRYSLER DODGE-JEEP and GORDIE BOUCHER FORD, states that it is a Wisconsin corporation, with no parents or subsidiaries, and that no publicly held company owns 10% or more of its stock.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is dated August 20, 2008 and is a published decision.

The order of the United States District Court, for the Northern District of California is dated July 17, 2006 and is a published decision.

JURISDICTION

Petitioner Paul Boschetto has invoked this Court's jurisdiction under 28 U.S.C. § 1254(1).

The Ninth Circuit Court of Appeal's opinion was rendered on August 20, 2008.

RELEVANT PROVISIONS INVOLVED

Federal Rule of Civil Procedure 12(b)2.

STATEMENT OF THE CASE

This case arises from the sale of a vehicle by an individual Wisconsin resident (Defendant Jeffrey Hansing ("Hansing")) to an individual California resident (Petitioner Paul Boschetto ("Petitioner or "Boschetto")) via an Internet auction. The on-line auction was conducted through the website of third party e-Bay. Although the vehicle in question was owned by Hansing, Boschetto alleges that Defendant Hansing made the sale within the course and scope of his employment with Respondent Gordie Boucher Ford Lincoln-Mercury of Janesville, Inc. ("Boucher Ford").

On February 26, 2006, Boschetto filed his Complaint for Damages, alleging causes of action for violation of the Consumer Legal Remedies Act (Cal. Civ. Code Section 1750, et seq.), Breach of Contract, Misrepresentation, and Fraud.

Hansing and Boucher Ford each filed Motions to Dismiss for Lack of Personal Jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. Defendant Hansing filed his Motion to Dismiss on March 27, 2006, and Respondent Boucher Ford filed its Motion to Dismiss on March 30, 2006. Petitioner Paul Boschetto opposed both Motions on substantive grounds, and alternatively requested leave to conduct additional discovery on the issue of jurisdiction.

On July 17, 2006, the District Court granted both Motions and issued an Order of Dismissal of all claims against all parties. Petitioner Paul Boschetto

appealed the District Court's Order of Dismissal to the Ninth Circuit Court of Appeals. The Ninth Circuit issued an opinion on August 20, 2008 affirming the District Court's order of Dismissal. In reaching its conclusion, the Ninth Circuit applied traditional jurisdiction analysis to the facts before it, and noted that the fact that eBay was used as the conduit for the sale of the vehicle did not affect the jurisdictional outcome.

The Ninth Circuit's ruling was correct, and there are no grounds that warrant the granting of Petitioner Paul Boschetto's Writ of Certiorari.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This action arises out of the sale of an automobile on eBay, an Internet auction website. Hansing, a Wisconsin resident, listed a motor vehicle (a 1964 Ford Galaxy) for sale. Petitioner Boschetto, a resident of California, succeeded at being the highest bidder when the eBay auction ended and purchased the vehicle from Hansing. After purchasing the vehicle, Boschetto claims he discovered problems with it and initiated this lawsuit in California seeking to rescind the sale with Hansing.

Boucher Ford is a motor vehicle dealership incorporated in the State of Wisconsin, with its principal place of business in Janesville, Wisconsin.

Boucher Ford is neither incorporated in nor qualified to do business in the State of California. It has no subsidiaries or related companies incorporated or qualified to do business in California, and its officers and directors neither reside nor are domiciled in California.

Boucher Ford, a Wisconsin business, has no employees residing or domiciled in California; nor has it contracted with persons residing in California to act on its behalf with respect to marketing, distributing or servicing any of its goods or products. Boucher Ford has no branch office or comparable facilities in California, and has no telephone listings or mailing address in California. Boucher Ford has no bank accounts or other tangible personal or real property in California.

Boucher Ford does *not* direct any of its advertising into California, and does not advertise in any publications that are directed primarily toward California residents. No meetings of its board of directors or shareholders have been held in California, and none of its officers or directors have attended business conferences or similar functions within California. Boucher Ford has never sold an automobile in California, by way of the Internet or any other means of commerce, nor has it ever delivered an automobile to California for any purpose.

In brief, Boucher Ford has no contacts with the forum state (California).

Much like Petitioner Boschetto's Ninth Circuit Opening Brief, his Writ of Certiorari lumps together Hansing and Boucher Ford and refers to them collectively as "Defendants."[1] Hansing and Boucher's interest are not aligned, they are separate parties and must be treated as such. The District Court's Order dismissing the case, later affirmed by the Ninth Circuit clearly differentiated between the two. Boucher Ford did *not own or sell* the subject vehicle to Boschetto and Boucher Ford's only connection to this lawsuit and sale is that Hansing happened to be an employee of Boucher Ford.

The automobile which is the subject of this lawsuit was personally owned by Hansing, and Hansing personally advertised the vehicle for sale on eBay. The vehicle was never owned or advertised for sale by Boucher Ford, and it received no money whatsoever from the sale. Following the sale of the vehicle to Boschetto, and as a convenience to him, Hansing directed Boschetto to pick up the vehicle from Hansing's workplace at Boucher Ford. However, Boucher Ford did not authorize the transaction or permit its Janesville, Wisconsin, facilities to be used for this purpose.

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[1] Petitioner erroneously named three other Defendants in his Complaint: "Frank Boucher Chrysler Dodge-Jeep," "Gordie Boucher Ford" and "Boucher Automotive Group."

On July 17, 2006, the United States District Court for the Northern District of California granted both Hansing and Boucher Ford's respective Motions to Dismiss for Lack of Personal Jurisdiction because of each party's lack of contacts with California. The District Court issued an Order dismissing the lawsuit on the grounds that the District Court of California lacked personal jurisdiction over Hansing and Boucher Ford. Petitioner Boschetto appealed the District Court's Order of Dismissal to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit issued an opinion on August 20, 2008 affirming the District Court's Order of Dismissal.

REASONS FOR DENYING BOSCHETTO'S WRIT OF CERTIORARI

Boschetto's Writ of Certiorari should be denied because this case does not fall within the parameters of SUPREME COURT RULE 10(C). Contrary to Boschetto's assertions, the United States Ninth Circuit Court of Appeals did not decide an important question of federal law that remains unsettled for this Court.

The lower courts have consistently and successfully applied traditional notions of personal jurisdiction to transactions accomplished through the use of Internet activities such as interactive websites, and specifically, eBay auctions. These

courts have concluded that the usual on-line auction process do not give rise to the "purposeful conduct" required for personal jurisdiction.

Boschetto's Writ of Certiorari should also be denied because his argument that the Ninth Circuit Court of Appeals erred in failing to apply the "effects test" set forth by this Court in *Calder v. Jones*, 465 U.S. 783 (1984) is not grounds for a Writ of Certiorari. This Court does not grant certiorari simply to correct an alleged error in a court of appeals' decision. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994). In fact, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUPREME COURT RULE 10.

Furthermore, Boschetto's claim that the Ninth Circuit erred in failing to use the *Calder* "effects test" is of no consequence because applying the test would not have changed the court's analysis or decision. The *Calder* test would not have led the court below to find that Boucher Ford had the requisite "minimum contacts" with California because there is no evidence that Boucher Ford purposefully directed any activity to California.

The same holds true for Boschetto's arguments pertaining to the applicability of the "sliding scale" analysis set forth in *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp.1119 (W.D. Pa. 1997) and the "variant"

results produced by the application of this test. *Petition*, p. 10-13. Boschetto continues to ignore the fact that the sliding scale analysis is inapplicable to cases in which an individual seller uses the eBay auction website to sell a single personal item. Finally, Boschetto offers no authority to support his argument that the use of the sliding scale analysis by the lower courts has created "differing views" of personal jurisdiction.

In the present case, the Ninth Circuit made a correct decision that is a restatement of "settled law" that makes review on certiorari "patently inappropriate." Gressman, Geller et. al. SUPREME COURT PRACTICE (9th ed. 2007) 279.

A. Review Is Not Warranted Because This Case Does Not Fall Within The Parameters of SUPREME COURT RULE 10

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion, and will only be granted for compelling reasons. SUPREME COURT RULE 10. This Court generally considers the following criteria in deciding whether to grant certiorari:

(1) Whether a conflict exists between a court of appeals' decision and a decision by a state's highest court;

(2) Whether a court of appeals has departed drastically from the accepted and usual course of judicial proceedings;

(3) Whether the state court of last resort has decided a federal question in conflict with another state court of last resort;

(4) Whether a court of appeals decision conflicts with a Supreme Court decision;

(5) Whether a decision involves an important federal question that should be settled by the Supreme Court.

SUPREME COURT RULE 10.

The Court will not grant certiorari simply to correct an error in a court of appeals decision. *Id.*, *see also Ticor Title Ins. Co. v. Brown*, 511 U.S. at 122. This is what Boschetto is asking this Court to do.

Here, Boschetto's main argument for certiorari is that the issue decided by the Ninth Circuit Court of Appeals is a question of federal law that should be settled by this Court. Boschetto does not assert any pertinent conflicts, drastic departures from judicial proceedings of the lower courts, or identify any compelling reasons as grounds for his petition, which should be denied.

B. The Jurisdictional Issues Presented By Boschetto Are Not Unsettled And This Court's Past Precedents Have Conclusively Addressed The Issue Central To This Dispute

Boschetto's core argument is that certiorari should be granted because the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court. To support his argument, Boschetto asserts that Federal and State appellate courts have issued "variant" views on personal jurisdiction. *Petition*, p. 10-13.

The standard by which this Court determines whether it should grant certiorari to address a question of federal law that "should be settled" is found in SUPREME COURT RULE 10 (C). In *Ratchford v. Gay Lib*, 434 U.S. 1080 (1978), this Court established that a question of law "should be settled" by this Court only when the Court's past precedents "do not conclusively address the issues central to th[e] dispute." *Id.* at 1082. This is not the case here.

The application of this standard to the instant case reveals that certiorari should not be granted. The issue decided by the Ninth Circuit--whether the one-time sale of an item by a private individual via the eBay Internet auction site provided sufficient "minimum contacts" to support personal jurisdiction over a non-resident defendant in buyer's forum state--is not an unsettled question of law pursuant to SUPREME COURT RULE 10 (C), but was in fact determined by existing and well established past precedents. As Boschetto concedes, this Court has issued numerous decisions on the issue of personal jurisdiction and the requisite "minimum contacts" with the forum state needed to establish jurisdiction over a defendant. *Petition*, p. 5.

This Court has set forth the two elements required by due process before a forum state can exercise personal jurisdiction over a non-resident defendant: (1) the non-resident must have sufficient minimum contacts with the forum state so that the defendant could anticipate being haled into the courts in the forum state; and (2) it must be fair and reasonable to require the non-resident to defend the suit in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-78 (1985). These elements ensure that persons have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Id.* at 472 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 218 (Stevens, J., concurring). In fact,

> "[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum

> state" in order to ensure that a defendant "will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . or of the 'unilateral activity of another party or a third person."

Burger King, 471 U.S. at 474-75 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). A defendant's "conduct and connection with the forum state" must be such that the defendant "should reasonably anticipate being haled into court there." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

This Court has established the following test for analyzing a claim of specific jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) The claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) The exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable.

Burger King, 471 U.S. at 475-477.

The lower courts have repeatedly used this test in cases where they address whether transactions over the Internet provide sufficient "minimum contacts" necessary for a finding of personal jurisdiction. Indeed, application of this precedent to cases involving the Internet "is quite natural since much communication over the Internet is still transmitted by ordinary telephone lines." *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506 511-512 (quoting *AT&T Corp. v. City of Portland*, 216 F.3d 871, 874 (9th Cir. 2000)).

1. Existing Law Has Established That Selling An Item Through An eBay Auction Does Not Constitute 'Purposeful Availment' Of The Forum State Where The Highest Bidder Happens To Reside

Other state and lower federal courts have addressed the application of traditional personal jurisdiction authorities to online auctions, like the eBay auction in this case. An overwhelming majority of courts have concluded that the personal sale of an item through an online auction does not rise to the level of purposeful conduct which is required to assert personal jurisdiction over a non-resident defendant.

In *Metcalf v. Lawson*, 148 N.H. 35 (2002), for example, the New Hampshire Supreme Court declined to exercise personal jurisdiction over a New Jersey defendant who sold an excavator via eBay to a forum resident. The court based its decision on the

fact that the seller had no control over who would ultimately be the winning bidder, did not intentionally direct her activities at New Hampshire, and was not aware that she was contracting with a New Hampshire resident until after the transaction was completed. *Metcalf*, 148 N.H. at 40. The court also noted the isolated nature of the transaction and the absence of any evidence that the defendant was a commercial seller. *Id.*

In *Gossett v. HBL, LLC*, 2006 WL 1328757 (D. S.C. 2006), the court declined to exercise jurisdiction over a Virginia dealership based on its sale of a Porsche to a forum resident through a standard eBay auction. The court held that the dealership's "mere listing on eBay is not enough to invoke jurisdiction in South Carolina." *Id.* at *2. The court found that the dealership, by placing an item for auction on eBay from its Virginia location, "did not advertise specifically toward South Carolina" and "anyone could have accessed its listing on the internet." *Id.*

In *Sayeedi v. Walser*, 2007 WL 623521 (N.Y. City Civ. Ct., Feb. 27, 2007) the defendant (a Missouri resident) sold an engine through an eBay auction to the plaintiff, a resident of New York. The court held that there was no personal jurisdiction over the Defendant merely because he sold the engine through an eBay auction to a New York resident. The court reasoned: "In the typical on-line auction sale the ultimate destination of any item is completely determined by the potential buyers through the bidding process. Accordingly, to summon the Defendant into a New York court on

this matter would contravene the traditional notions of 'fair play' and 'substantial justice' that have become the touchstone of personal jurisdiction." *Id.* at *4.

In *United Cutlery Corp. v. NFZ, Inc.*, 2003 WL 22851946 (D.Md. 2003), the Maryland Court declined to exercise personal jurisdiction over an Ohio defendant where the sole asserted basis for jurisdiction was sales made by the defendant to the forum through Internet auction sites. The Court placed particular emphasis on the fact that the seller's "manifested intent was to sell to the highest bidder, regardless of the state in which the bidder resided," and that this, without more, was insufficient to show the defendant intentionally directed his Internet business activities to residents of the forum state. *Id.* at *4-*5.

In *Winfield Collection, Ltd. v. McCauley*, 105 F.Supp.2d 746 (E.D.Mich. 2000), a Michigan plaintiff brought a copyright infringement action against a Texas defendant who sold crafts on eBay that allegedly used the plaintiff's protected artistic patterns. The defendant sold crafts to two residents of the forum state (Michigan) who happened to be the highest bidders. The Court declined to permit personal jurisdiction over the individual defendant because it found that the purpose of an auction is to award the property offered to the highest bidder, and that the seller exercises no control in determining who the highest bidder will be. *Id.* at 749. Thus, the

District Court concluded the defendant "cannot be said from these sales of this kind to have 'purposefully availed herself of the privilege of doing business" in the forum state because "[s]uch sales are a 'random' and 'attenuated' contact." *Id.*

In *Action Tapes, Inc. v. Weaver*, 2005 WL 3199706 (N.D.Tex. 2005), a Texas plaintiff sued a Missouri defendant for sales of allegedly copyright-protected embroidery patterns through on-line auctions on the eBay website. The court reasoned that an eBay seller's contact with the winning bidder's forum is "the exact type of 'random, fortuitous, and attenuated' event that the *Burger King* Court intended to exclude from jurisdictional reach." *Id.* at *3 (*quoting Burger King*, 471 U.S. at 475); *see also Action Tapes, Inc. v. Ebert*, 2006 WL 305769 (N.D.Tex. 2006) (finding no personal jurisdiction over an eBay seller where the traditional auction process was not altered or circumvented in any way).

In *Ginsburg v. Dinicola*, 2007 WL 1673533 (D. Mass. 2007), a Massachusetts plaintiff sued the operator of a company in New York that restores and sells used automobiles throughout the United States for allegedly selling him a "fake" vintage automobile through an on-line auction on the eBay website. In declining to exercise jurisdiction, the District Court reasoned that there was no evidence that the defendant had any additional contacts with the

forum state (Massachusetts) other than the single sale on the eBay website. *Id.* at *4.

The clear weight of this settled jurisprudence, dating back eight years, establishes that the mere sale of an item through a typical online auction does not subject the seller to personal jurisdiction where the highest bidder happens to reside.

In those rare Internet commerce cases where other courts have found personal jurisdiction where the buyer resides, those findings were based on facts far different from those presented here. In *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813 (D. Mich. 2006), for example, the Michigan District court exercised personal jurisdiction over non-resident New York defendants based on two auctions for paintings where the winning bidder was a resident of Michigan. In finding that personal jurisdiction existed over the New York eBay sellers, the court placed heavy emphasis on the fact that the defendants ran an ongoing on-line business and were "highly sophisticated sellers with an extensive offering of merchandise and a volume of business that require[d] a warehouse." *Id.* at 822. The facts in *Dedvukaj* were far different from the facts here, where Hansing made a one-time, non-commercial sale in his individual capacity.

Similarly, in *McGuire v. Lavoie*, 2003 WL 23174753 (N.D.Tex., Aug. 19, 2003), the court found jurisdiction in an on-line auction case because the

Wisconsin seller ended the auction prematurely and entered into a traditional sales relationship with the buyer through a series of agreements by which the seller sold twenty tractors to the buyer over a seven month period. During the course of their several month relationship, the defendant also knew the identity of the buyer and that the buyer was a resident of the forum state (Texas). *Id.* at *1, *3. The facts of the present case are far different. It is undisputed that this was a one-time sale of a personal item to an anonymous bidder completed through the normal on-line auction process. Hansing did not know the identity or location of the winning bidder until *after* the sale was completed.

The cases with facts similar to those in the instant case were consistently decided using the well established precedent set forth by this Court to determine the existence of sufficient "minimum contacts" for personal jurisdiction. The application of these sound principles has led to the conclusion that the mere sale of an item through a typical online auction does not subject the seller to personal jurisdiction wherever the highest bidder happens to reside. Boucher Ford submits that the issues raised by Boschetto can and have, in fact, been decided using the traditional jurisdictional analysis previously provided by this Court. It is not necessary for this Court to revisit the sound principles it has created to analyze personal jurisdiction issues which apply with equal force to the instant case and cases like it.

C. The Fact That The Ninth Circuit Did Not Apply The "Effects Test" To Its Personal Jurisdiction Analysis Does Not Warrant Review By This Court

Boschetto argues that the Ninth Circuit erred in failing to apply the "effects test" which was enunciated by this Court in *Calder v. Jones*, 465 U.S. 783 (1984), in its analysis of Hansing and Boucher Ford's "purposeful availment" of the forum state as necessary to confer personal jurisdiction. *Petition*, p. 9. Boschetto asserts that the Ninth Circuit instead evaluated the "purposeful availment" analysis using the standards set forth in cases involving contract disputes rather than those sounding in tort, and argues that use of the *Calder* effects test militates in favor of finding personal jurisdiction over Respondent. *Id.*

Boschetto also claims, without basis, that the Ninth Circuit erred because it would be "patently unreasonable and unfair" to allow an individual seller, like Hansing, to take advantage of modern technology in selling his vehicle to a California resident without being subject to jurisdiction in California. *Petition*, p. 12-13. Such alleged errors by the Ninth Circuit cannot be the subject of a writ of certiorari, as "[i]t has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions."

Gressman, Geller et al., SUPREME COURT PRACTICE at 276.

1. Contrary To Boschetto's Assertions, The Application Of The "Effects Test" To This Case Is Of No Consequence Because It Does Not Lead To A Finding Of Personal Jurisdiction

Boschetto's argument that the Ninth Circuit erroneously failed to apply the "effects test" set forth by this Court in *Calder v. Jones*, aside from being misplaced, is of no consequence because its application would not change the outcome reached by the Court of Appeals.

In order to satisfy the effects test, a plaintiff must show that defendant: (1) committed an intentional act; (2) the act was expressly aimed at the forum state, and (3) causes harm she knows is likely to be suffered in that jurisdiction. *See Calder*, 465 U.S. at 788-790.

Here, as a threshold matter, Boschetto cannot show that Hansing, much less Boucher Ford, purposefully directed any activity at California. It is undisputed that Hansing did not know the identity or location of the winning bidder until after the sale was completed. Additionally, Boschetto has not shown that Hansing specifically aimed or tailored his auction to Boschetto specifically, to the residents of California, or for that matter, any state in particular.

Boschetto can and does argue Hansing could foresee that California residents would bid on his auction, but as long established by this Court, foreseeability is not enough. *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson* 444 U.S. at 295.)

Merely advertising over the Internet is not sufficient to confer jurisdiction throughout the United States, despite the possibility that the advertisement or website at issue may be viewed nationwide. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155-57 (9th Cir. 2006). The defendant must do "something more" for courts to conclude that he or she "expressly aimed" activity at the forum, such as individually targeting its residents. *Schwartzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004). Here, Hansing did no such thing. He simply allowed persons with eBay access throughout the United States and Canada to bid on the subject vehicle.

The cases cited by Boschetto in support of his assertion that the effects test will yield a finding of jurisdiction over Boucher Ford are readily distinguishable because their facts reveal that the defendants in those cases either engaged in multiple and ongoing transactions and discussions with the plaintiffs, committed an intentional act or acts specifically targeting the plaintiffs and/or were using the Internet for something more than the one-time sale of an automobile on eBay.

In *Dudnikov v. Chalk Vermillion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008) the defendants, after viewing the plaintiffs' auction page, sent a notice of copyright infringement to eBay in order to intentionally suspend plaintiffs' auction, which in turn allegedly caused harm to plaintiffs' business in the forum state (Colorado). The plaintiffs' eBay auction page disclosed their location in Colorado. The defendants also directly contacted the plaintiffs in Colorado and threatened them with suit in federal court. The 10th Circuit, applying the effects test, found that personal jurisdiction existed over non-resident defendant. In reaching its conclusion, the 10th Circuit relied heavily on the fact that the defendants engaged in intentional acts with the intent to halt plaintiffs' auction and had knowledge that the plaintiffs were in the forum state when they took deliberate steps to hurt plaintiffs' business. *Id.* at 1077-1078. In reaching its conclusion, the Tenth Circuit was careful to limit the applicability of the effects test to cases in which there were intentional actions expressly aimed at the forum state, noting that simply holding an on-line auction on eBay is not proper grounds for a finding of personal jurisdiction. *Id.* at 1074.

McGuire v. Lavoie, 2003 WL 23174753, also stands in contrast to the present case. In *McGuire*, the Wisconsin seller first started selling tractors on the eBay on-line auction website, then terminated the auctions and began a traditional sales relationship with the buyer, a Texas resident,

through a series of agreements in which the seller eventually sold twenty tractors to the buyer over a seven month period. The seller knew the buyer's identity and that the buyer was resident of the forum state (Texas) throughout the parties' sales relationship. *Id.* at *1, *3.

In *Fletcher Jones West Shara v. Rotta*, 919 So.2d 685 (Fla.App.3 Dist. 2006) the court made a finding of personal jurisdiction when the seller, an automobile dealership, initiated communications with the buyer, a Florida resident, for the sale of a luxury automobile. In the course of their transaction, the seller made misrepresentations to the buyer knowing that he was both in the forum state (Florida) and a resident of that state. Much like in *McGuire*, the dispute between the parties had its origins in an eBay transaction, but the buyer and seller later engaged in a business relationship outside the parameters of a simple on-line auction, with the seller actually contacting the buyer in the forum state and making the misrepresentations during direct communications with the buyer knowing he was in the forum state. *Fletcher Jones*, 919 So.2d at 686-687.

The facts in *Verizon Online Services v. Ralsky*, 203 F.Supp.2d 601 (E.D. Va. 2002) are also different to those in the present case. In *Verizon* the defendants, professional spammers, targeted plaintiff Verizon Online Services by deliberately sending millions of unsolicited bulk e-mails ("UBE") to

Verizon's servers, seven of which were in the forum state (Virginia). The defendant intentionally sent the UBE to Verizon's servers to solicit business from Verizon's customers for pecuniary gain. *Id.* at 617. In finding the defendants subject to the jurisdiction of Virginia, the *Verizon* court greatly relied on the deliberate nature of defendants' conduct towards Verizon and noted that the sending of the UBE to Verizon's serves was "not a one-shot affair." *Id.* (quoting *Compuserv Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996)).

In *Internet Doorway, Inc. v Parks*, 138 F.Supp.2d 773 (S.D. Miss. 2001), the court made a finding of personal jurisdiction over a Texas defendant based on the defendant's intentional acts of sending quantities of unsolicited e-mail advertising pornographic websites into the forum state (Mississippi) and falsifying the "from" header in the unsolicited e-mails to make it appear as if the e-mail had been sent from the plaintiff, an Internet service provider located in the forum state for pecuniary gain. The Texas defendant's acts caused the plaintiff damage in the forum state. In finding defendant subject to the forum state's jurisdiction, the court relied on the active, rather than passive nature of the defendant's acts of sending unsolicited e-mails for pecuniary gain knowing that it would be received and opened in the forum state, as well as the deliberate action defendant took toward the plaintiff. *Id.* at 777, 779-780.

In stark contrast, Boschetto has not shown that either Hansing, the seller of the vehicle or Boucher Ford, which had no role in the transaction whatsoever, directed any activity at California, or specifically targeted any California residents, including Boschetto. Hansing made a one-time sale of a personal item on eBay, permitting those with eBay access to bid on his car, agreeing to let the highest bidder retrieve the car in Wisconsin.

Although *Fletcher* and *McGuire* both involved on-line auctions, it is evident that the sellers in those cases were commercial vendors engaged in something more than just selling a single item on eBay. The sellers in these cases transacted directly with the buyers with full knowledge of the buyers' identity and location, thus individually targeting the residents of the forum states. *See Pebble Beach Co.*, 453 F.3d at 1157.

Verizon and *Internet Doorway* are also readily distinguishable because the defendants in these cases were spammers who sent untold numbers of unsolicited e-mails for pecuniary gain specifically targeting the residents of the forum states.

ALS Scan, Inc. v. Digital Service Consultants, Inc. 293 F.3d 707, 714 (4th Cir. 2002) does not support Boschetto's arguments at all because its facts are distinguishable from the present case. The defendant in *ALS* was an Internet Service Provider whose electronic signals were received in Maryland,

the forum state. In *ALS*, the Fourth Circuit nonetheless refused to extend personal jurisdiction over the defendant Internet Service Provider where the defendant did not direct any of its electronic activity at any target in the forum state. *Id.* at 714.

D. The "Sliding Scale" Test Developed In The *Zippo* Case And Discussed By Boschetto In His Petition For Certiorari Is Not Applicable To The One-Time Sale Of An Item On eBay By A Non-Commercial Seller And Only Serves To Confuse The Issues

The "sliding scale" analysis developed in *Zippo MFG. Co. v. Zippo Dot Com, Inc.* 952 F.Supp. 1119 (D. Pa. 1997) seeks to distinguish interactive from passive websites. Under the *Zippo* sliding scale test, "proper exercise of personal jurisdiction in a claim involving Internet contact is directly proportional to the commercial interactivity of the website over which the contact is made." *Action Tapes v. Weaver*, 2005 WL at *2. Inevitably, this type of analysis yields variant views because, by its very definition, it factors in the spectrum of the commercial interactivity of the websites at issue.

However, contrary to Boschetto's assertions, courts have consistently declined to apply the *Zippo* sliding scale analysis to tests to eBay auctions because in these cases, it is eBay, and not the user, who controls the interactivity and marketing efforts of the website.

In *Action Tapes v. Weaver,* the Texas Northern District Court declined to extend the *Zippo* test to eBay auctions, recognizing that eBay sellers do not maintain or control the "interactivity" of the eBay website. *Action Tapes v. Weaver*, 2005 WL at *2. In doing so, the *Action Tapes* court reasoned that buyers and sellers who connect through eBay "cannot be said themselves to control eBay's degree of commercial interactivity any more than a buyer and seller at Sotheby's can be said to be responsible for the premises or to control the auctioneer" *Id.*

The District Court in *McGuire* made a similar finding, noting that "[b]ecause the majority of cases applying the *Zippo* test involve defendant's conduct over its own website, its application to an internet auction site is questionable." *McGuire*, 2003 WL 23174753 at *3.

In *Metcalf v. Lawson*, 148 N.H. 35, the New Hampshire Supreme Court also refused to apply the *Zippo* test to an Internet auction, observing that the test is "not particularly helpful" in Internet auction cases because a defendant seller conducts his auction over a third party website which he does not maintain and cannot control. *Id.* at 39.

Similarly, the Massachusetts District Court in *Ginsburg v. Dinicola*, 2007 WL 1673533 refused to extend the *Zippo* sliding scale test to an eBay

auction, noting that "this [sliding] scale test has been applied in cases which the issue is a defendant's conduct on a website that the defendant controls." *Id.* at *3, fn. 1.

Here, the eBay auction site temporarily advertised a good for sale by a Hansing, a private individual. The listing closed once the item was sold, extinguishing the Internet contact between the buyer and seller with this transaction.

The cases cited by Boschetto to support his argument for the application of the sliding scale analysis contain facts readily distinguishable from the present case. In *Zippo*, the defendant owned and operated the website at issue. *Zippo*, 952 F. Supp. At 1121. In *People v. Lipsitz*, 663 N.Y.S.2d 468 (1997), as Boschetto fails to mention, the defendant ran an ongoing business in which he sold magazine subscriptions from the forum state while physically present in that forum, and the wrongful acts at issue "physically occurred" in the forum state. *Id.*, 471-473-474.

In *Digital Equip. Corp. v. AltaVista Technology, Inc.*, 960 F.Supp. 456, 471 (D. Mass. 1997), the Massachusetts District Court found that defendant Alta Vista Technology, Inc. ("ATI") was subject to personal jurisdiction in Massachusetts where: ATI had entered into an ongoing contract with Plaintiff that included a clause requiring that the contract be interpreted "under and in accordance"

with the laws of Massachusetts, it was ATI's alleged breach of this contract that gave rise to Plaintiff's lawsuit, and ATI operated its own website accessible to Massachusetts computer users and had made at least three different sales to Massachusetts residents of software products in the course of and related to the operation of its website. *Id.* at 464.

The facts in the instant case are markedly different. Boucher has not alleged that any contract with a choice of law clause was ever entered into by Boucher Ford or Hansing. Neither Hansing nor Boucher Ford operated the eBay auction website, neither engaged in multiple transactions with California residents and neither where physically present in California during the one-time eBay auction.

In *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-511 (D.C. Cir. 2002), the District of Columbia Court of Appeals, applying the sliding scale test, suggested that personal jurisdiction over defendant securities broker in Nebraska could exist based solely on the level of interaction offered by the website that the defendant owned and operated. *Id.* at 513 However, in using *Gorman* to support his argument for the application of the *Zippo* sliding scale analysis Boschetto again ignores the basic fact that it is eBay and not Hansing or Boucher Ford who owned and operated the on-line auction website.

E. The Exercise of Jurisdiction Over Boucher Ford Would Be Unreasonable

Personal jurisdiction is permissible only so long as the exercise of jurisdiction over a non-resident defendant comports with fair play and substantial justice. *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 113 (1987). In *Asahi*, this Court held it would be unreasonable to exercise jurisdiction over a foreign corporation that had virtually no contact with the forum state, as is the case here. This Court considered such factors as the interests of the forum state in adjudicating the claim, plaintiff's interest in obtaining relief, and the burden on the defendant of appearing in the forum. *Id.* at 113-116.

Here, it would be grossly unjust to require Boucher Ford, a Wisconsin corporation, to defend this case in California based on the unilateral activity of one of its employees which had no connection to Boucher Ford's business. Boschetto is entirely capable of litigating in Wisconsin just as he chose to bid on and purchase a vehicle he knew was located in that state. Boucher Ford would face significant hardship in litigating thousands of miles from its only place of business. This is particularly true given its nonexistent contacts with California and the fact that none of the activities underlying the claims against it occurred in California. Indeed, Boucher Ford would be forced to shuttle witnesses,

documents and other evidence relating to the underlying transaction back and forth between Wisconsin and California.

CONCLUSION

For all of the foregoing reasons, Boucher Ford respectfully requests that this Court deny Boschetto's Writ of Certiorari.

Respectfully submitted,

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